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No. 23 and No. 24.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 23.

UNITED STATES OF AMERICA, *et al.*,

Appellants,

vs.

HENRY E. DRUM, *et al.*

No. 24.

REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.,

Appellant,

vs.

HENRY E. DRUM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR WEATHER-SEAL, INC.

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TABLE OF CONTENTS.

Statement 1

Question 2

Presentation of Question 2

Argument 5

Conclusion 15

TABLE OF AUTHORITIES.

Cases.

Brooks Transportation Company, et al. v. United States, 93 F. S. 517, Aff. 340 U. S. 925, 95 Law Ed. 668 11

H. B. Church Truck Service Co., Common Carrier Application, 27 M. C. C. 191 ..... 6, 7, 8

Interstate Commerce Commission v. Woodall Food Products Co., Inc., 112 F. S. 639, Aff. 207 F. 2d 517 11

Taylor v. ICC, 209 F. 2d 353, Certiorari Denied 74 S. Ct. 677 10

Van Meter v. PUCO, 165 O. S. 391, 135 N. E. 2d 848 14

Statutes.

Motor Carrier Act, Section 203, USC Title 49, Section 303 8

Motor Carrier Act, Section 204, USC Title 49, Section 304 9

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BRIEF FOR WEATHER-SEAL, INC.

STATEMENT.

This action arose upon a petition filed in the District Court for the Western District of Oklahoma to enjoin and review a decision of the Interstate Commerce Commission issued in the case of Oklahoma Furniture Manufacturing Company, et al.—Investigation of Operations; No. MC C-2143, decided April 22, 1959, and reported in Volume 13, Federal Carriers Cases, published by The Commerce

Clearing House, at paragraph 34,602 (page 40,494). Weather-Seal, Inc. was given leave to intervene on behalf of the petitioner. The district court granted the injunction and its opinion is reported at 193 F. S. 275.

QUESTION.

Contrary to the question posed by appellants, Weather-Seal, Inc. would present the question as follows: Is the bona fide lease of motor vehicles by a private carrier and the hiring of the lessor of such equipment as a bona fide employee of the lessee to drive the leased equipment contrary to law?

PRESENTATION OF QUESTION.

At the time of the hearing before the Interstate Commerce Commission Albert Douglas, an inspector for the Interstate Commerce Commission, was called as a witness. He stated that the purpose of the investigation was to investigate leases of the Oklahoma Furniture Manufacturing Company (T-99).* During the course of his interrogation Witness Douglas was asked questions concerning "vehicle condition reports," which is a report a carrier must make in compliance with the safety regulations of the Interstate Commerce Commission. Counsel for the Oklahoma Furniture Manufacturing Company objected to the question on the ground that there was no issue as to safety of operations. Counsel for the Interstate Commerce Commission agreed that the only issue before the Examiner was one of control over the operation by the carrier and that there was no issue with respect to compliance with the rules and regulations of the Commission (T-95). Witness

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* All references refer to the Transcript of Record filed in the United States Supreme Court.

Douglas later testified that the investigation was started "on account of some of the road inspections that we made had indicated that the owner was also driving the equipment" (T-99).

That the findings and conclusions of the Interstate Commerce Commission fully indicate the only issue in the case was whether or not the driving of the vehicles by the lessor was contrary to law is clearly shown by the decision of the Interstate Commerce Commission. We quote from the majority opinion of the Commission:

> (T-155) "* * * Even if each owner-operator should be considered to be a bona-fide employee of the Company with respect to his driving duties, he does not lose his status as an independent contractor with respect to the equipment and his own services as a driver cannot be considered to take from him and give to the Company such control as would overcome the presumption stated in the *Church* case, *supra* * * * There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists. * * *
>
> * * * * *
>
> (T-160) "* * * Concededly, without arrangements with respect to the complementary services neither the driver nor equipment services of the owner-operators, standing alone, could be found to be those of carriers for-hire, but once the owner-operators enter into the comprehensive arrangements here disclosed, they bring into life transportation services of which they are the essential and moving part, * * *
>
> * * * * *
>
> (T-161) "* * * It is noted, however, that the circumstances here are such that the described operations would not constitute a bar to our finding the

owner-operators fit to conduct comparable operations under appropriate permits should they apply to us and prove that their operations are consistent with the public interest and the national transportation policy. * * *"

and from the dissenting opinion of Commissioner Webb:

(T-163) "No one can fail to grasp the significance of this sweeping pronouncement. It means plainly and simply, that no owner-operator can be employed by a common carrier, a contract carrier, or by a private carrier, if he rents and drives his own equipment unless, of course, he holds appropriate operating authority issued by the Commission. * * *

(T-164) "In addition to its ominous implications, the report contains a few that are anomalous. For example, if Norris drives Shinn's tractor and Shinn drives Norris,' both would probably be held to be enengaged in private carriage. And this would be true even though all other aspects of the transportation service were identical to the arrangements condemned in this proceeding. Also, if a company driver owning no equipment drives Shinn's tractor and Shinn drives a company tractor, neither would be regarded as performing a for-hire service."

(T-165) "I have no doubt whatever concerning the laudable motives which inspired the conclusion reached in the report. There is an understandable desire to promote the economic well-being of for-hire carriers and a natural reluctance to permit a private carrier to divest itself of any of the inherent disadvantages of that mode of transportation."

There can be no other reason for the Commission to find as they did since they also found that (1) there was no attempt at subterfuge; (2) the lease agreements, standing by themselves, were proper; and (3) the employment contracts, standing alone, were also proper. Nevertheless,

they proceeded from these three premises to find that when a lessor-driver drives his own truck it is illegal.

The question as presented by the Government, which attempts to remove the question from one of control to one of finances, was not the question considered by the Interstate Commerce Commission. The statements made by the Government are not supported by the record. The Shipper did not transfer the risk of loss due to transportation to the drivers of their leased equipment. The shipper was required to pay a fixed charge per mile, regardless of how much furniture was transported out-bound and regardless of whether or not they had any return freight. (T-109.)

ARGUMENT.

The Interstate Commerce Commission stated the question with which they were concerned as follows:

> "* * * We are here concerned with whether the company has the *exclusive right* to control, direct, and dominate the transportation purportedly performed by it as private carriage. In *H. B. Church Truck Service Co., Common Carrier Application*, 27 M. C. C. 191, it was stated:
>
> "'* * * in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensation, in other words is for-hire transportation and as such is subject to regulation. This presumption will, of course, yield to a showing that the shipper has *the exclusive right and privilege of controlling the transportation service*, as for example, if the equipment were operated by the shipper's employee.' (Emphasis added.)" (T-153-4.)

The court will note that the sole issue as stated by the Interstate Commerce Commission was whether or not the

shipper had *exclusive right* to control the transportation (emphasis, the Commission's). The court will further note that the Commission conceded that the hiring contract, standing alone, was bona fide and, further, that the Commission conceded that the lease arrangement was bona fide (T-160). The Supreme Court will further note the absence of any claim, absence of any finding, or even the absence of any discussion by the Interstate Commerce Commission that the arrangement, or any part of the arrangement, was a subterfuge or a planned evasion of the law. On the contrary, the Commission agreed that the arrangement was open and above-board.

Failing to discover any lack of control in the employer, the Commission then proceeded with the following startling and dangerous statement:

> "There is present whenever the owner-operator drives his own equipment the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists." (T-155.)

By this statement, the Interstate Commerce Commission converted a reasonable rule for the determination of whether a purported private transportation service was indeed private transportation to an irrebuttable presumption by, in effect, removing the following last sentence from the rule propounded in the *Church* case, to-wit:

> "This presumption will, of course, yield to a showing that the shipper has *the exclusive right and privilege of controlling the transportation service*, as for example, if the equipment was operated by the shipper's employee." (Commission's emphasis.)

Commissioner Webb noted the startling effects of such a statement, (and recognizing that common and contract carriers, at least heretofore, have had the right to hire owner-drivers) with the following comment:

"No one can fail to grasp the significance of this sweeping pronouncement. It means plainly and simply, that no owner-operator can be employed by a common carrier, a contract carrier, or by a private carrier, if he rents and drives his own equipment unless, of course, he holds appropriate operating authority issued by the Commission. Thus, the mere status of owner-operator-lessor is said automatically to defeat lessee control irrespective of the existence of convincing facts to the contrary." (T-163-4.)

Commissioner Webb further noted that the result was a complete departure from the rule of the *Church* case while claiming to be following its precept.

"The report, while holding up the single element of 'status' as the conclusive factor in determining who has the right to control and direct, is inconsistent in citing the *Church* case, *supra*, and the *R. N. G.* case, *supra*. The latter case contains the following statement:

" 'The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between applicant (lessor) and Gaylord (lessee), including particularly the actual practices in the conduct of the operation. No one element or circumstance is by itself conclusive. See *H. B. Church Truck Service Co. Com. Car. Application*, 27 M. C. C. 191.' " (T-164.)

The district court, in its opinion, after reviewing the reasoning of the Interstate Commerce Commission, stated the situation as follows:

"The Commission in the instant proceeding in effect made the presumption irrebuttable and repudiated its decision in the Church case by the following declaration:

" 'There is present, whenever the owner-operator drives his own equipment, the right and power of

> the lessor to defeat any supposed right to control that the shipper-lessee may believe exists.' " (T-22.)

The district court then repudiated the irrebutable rule propounded by the Commission and returned to the rule of the *Church* case by finding that:

> "The record before the Commission discloses that there was more than sufficient evidence to rebut any presumption or inference of transportation for-hire. The Company had the right to, and actually did control, direct and dominate the transportation of its products and the equipment and personnel concerned therewith. The owner-operators were not in substance engaged in the business of transportation for-hire, but were merely employees of the Company and were so considered by both the Company and themselves." (T-22.)

The position taken by the Interstate Commerce Commission completely overlooks and ignores the fact that the Congress of the United States has divided all motor carriers into three categories and given the Interstate Commerce Commission not only the authority, but the duty to regulate such carriers in conformity with the declared transportation policy of the United States. These three categories are, of course, common carriers, contract carriers and private carriers. All three are defined by the Congress in Section 203 of the Motor Carrier Act, USC Title 49, Section 303. Sub-section 17 of the foregoing section defines private carriers as follows:

> "The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of

sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

The authority which the Interstate Commerce Commission has over private carriers is set forth in Section 204 of the Motor Carrier Act, USC, Title 49, Section 304. It is therein provided that the Commission shall establish reasonable requirements to promote safety of operations and to prescribe qualifications and maximum hours of service of employees and standards of equipment. In accordance with the authority granted, the Commission has established such safety regulations, which are applicable to all carriers who may be regulated by the Commission.

There is no question but that the Interstate Commerce Commission was unduly concerned with its assumed responsibility of protecting common and contract carriers. For this assumption, we note the following statement of Commissioner Webb in his dissenting opinion.

> "I have no doubt whatever concerning the laudable motives which inspired the conclusion reached in the report. There is an understandable desire to promote the economic well being of for-hire carriers and a natural reluctance to permit a private carrier to divest itself of any of the inherent disadvantages of that mode of transportation." (T-165.)

We can well understand that such should be the expected position of the regulated carriers and we find this position stated in the brief of the Regular Common Carrier Conference, at page 9, as follows:

> "Both Congress and the Interstate Commerce Commission, in recognition of that principle, have expressed deep concern about the threat to regulated transportation posed by various arrangements which seek the guise of private carriage * * *"

We were shocked that this was also the position of the Government in their brief before this Court and as set forth in their brief at page 12.

We submit that there is not one word in the Acts of Congress which both create the Interstate Commerce Commission and provide for its jurisdiction and duties which sets one class of carriers above another. Actually, in the words of one court, they are equal and must be treated equal by the Commission. See *Taylor v. ICC*, 209 F. 2d 353, Certiorari Denied 74 S. Ct. 677, wherein the court commented on this subject as follows:

> "The Commission contends a policy of Congress requires us to give a liberal interpretation to the Act in favor of establishing that Taylor is a contract and not a private carrier. 'Liberal' is a weasel word in this connection. The policy of the Act declares as follows:
>
> " 'It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of *all modes* of transportation subject to the provisions of this Act, so administered as to recognize and *preserve the inherent advantages of each*; * * *' (Emphasis supplied.) Transportation Act of 1940, Par. 1, 54 Stat. 899, 49 U. S. C. A. note preceding section 301.
>
> "One of the modes of transportation subject to the Act, as having 'inherent advantages' is that by private carriers of their own property. This is stated in 303 (17) as follows:
>
> " '(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle," who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is

for the purpose of sale, lease, rent, or bailment or in furtherance of any commercial enterprise.'

"We think that in interpreting this paragraph and paragraph (15) providing for 'contract carriers' later considered, there is no rule of interpretation more liberal for one than the other."

The intention of Congress is very clearly set forth in the opinion by the court in *Brooks Transportation Company, et al. vs. United States*, 93 F. S. 517, Aff. 340 U. S. 925, 95 Law Ed. 668. This is recognized as one of the leading cases on the subject of private carriers. In this case, in which the courts affirmed a decision of the Interstate Commerce Commission relative to private carriage, the court quoted at length from the Congressional Record with respect to the intention of Congress as to the right of a manufacturer to transport its own products. Unquestionably, anyone in business has a right to make arrangements for the transportation of its own products and need not use the services of either of the other two regulated carriers.

Another illuminating case on the right of a private carrier is *Interstate Commerce Commission vs. Woodall Food Products Co., Inc.*, 112 F. S. 639, Aff. 207 F. 2d 517. In this case the Commission had said that the various arrangements for the transportation of poultry were a "round robin hocus-pocus and a subterfuge." The court in overruling the Commission said that the transportation was that of a legitimate private carrier since "he deals in a commodity he owns and it was his primary business function." In this case the carrier owned no vehicles and carried all of its products on leased equipment. The report is silent as to what arrangements there were with respect to driving the equipment.

From an examination of the record as a whole, made before the Interstate Commerce Commission commencing

at page 37 of the Transcript, it is clear that the complete control was absolutely exercised by this shipper. It is equally clear from a reading of the opinion by the majority of the Interstate Commerce Commission that no matter what this shipper would have done, its motivations would have been questioned and an irrational inference drawn from the true facts. It is clear from a reading of the record that the following is true: The leases were entered into for a purely economic and business reason (T-41-42). The owners of the leased trucks were hired as drivers and covered by a union contract, which union contract covers all of the employees of the Oklahoma Furniture Manufacturing Company (T-42-86). The respondent drivers received all of the benefits that any other employee of the company received, to-wit: Workmen's Compensation, vacations, social security, and income tax was withheld from their earnings (T-101). They received separate checks for their earnings as drivers and for the lease of their equipment (T-46-64). The employer chose the route the drivers were required to follow and supervised the repair and maintenance of the leased equipment (T-50-57). The drivers who formerly drove company-owned equipment and now drove their own leased equipment received the exact same instructions from the company and had the same control exercised over their employment (T-57-8, 62, 64, 100-1). The drivers were changed from truck to truck at the direction of the employer (T-58, 61, 65, 80, 101). The employees who drove company-owned tractors took them home, just as the employees who operated their own tractors took them home (T-60, 101). It was the employer's policy to assign the same driver to the same equipment, whether the company owned it, or whether it was leased (T-69, 76, 101). It was the Interstate Commerce Commission which urged the employer

to make the respondents employees (T-89-90, 91). The drivers considered themselves Company employees (T-64). The equipment was used solely in the service of the Oklahoma Furniture Manufacturing Company and was never used for the transportation of the property of any other person, firm or individual (T-79).

The facts, as developed in this record, do not support the Government in the principle repeated throughout its brief that the arrangement complained of was illegal because it assured Oklahoma Furniture Manufacturing Company of a fixed and definite cost for transportation—see the Government's brief, page 4, 8, 13, 14, 19, 20, 22, 23, and 29. In fact, at page 22 of its brief the Government inferred that Oklahoma Furniture Manufacturing Company was freed of the risk of deadheading (operating with an empty vehicle) in that at that point in its brief the Government stated that the arrangement permitted Oklahoma Furniture Manufacturing Company to operate "at a fixed cost per mile of transportation actually performed."

The facts are diametrically opposed to this position in that the lessors of the equipment received the same mileage for the use of their tractors regardless of the amount of freight loaded in the trailer. The lease provided for a fixed rental per mile regardless of whether there was any freight, one pound, or a full load on the trailer (T-109). There is not a scintilla of evidence, or claim of evidence in the record that the lease was not followed to the letter. The drivers, likewise, were paid for each mile driven regardless of whether or not there was any freight in the trailer at all. Again, there is not a scintilla of evidence or claim that the drivers were not paid as stated.

The Public Utilities Commission of Ohio, operating under statutes and rules very similar to those under which the Interstate Commerce Commission operates, and also

apparently operating under somewhat the same psychology, came to the same conclusion as the Interstate Commerce Commission did in this case. Its decision was reversed by the Ohio Supreme Court in *Van Meter v. PUCO*, 165 O. S. 391, 135 N. E. 2d 848. We quote syllabus 2 thereof:

> "Where a driver-owner while driving his truck in carrying property is in every respect a servant of one to whom he has leased the truck, such driver-owner cannot be, by reason of the lease of such truck and the rendering of any services provided for in such lease and by reason of such driving, 'engaged in the business of (contract) carriage of * * * property * * * or of providing or furnishing such transportation service' within the meaning of those words as used in Section 4923.02, Revised Code." (In Ohio the statutes have historically referred to "contract" carriers as "private" carriers. So that in the opinion by the Ohio Supreme Court what is understood to be a contract carrier is referred to as a "private" motor carrier. The Legislature recently has attempted to clarify this by using the terms jointly in Amended Section 4923.02 of the Revised Code of Ohio.)

We quote from the court's opinion:

> "Without a driver, a truck cannot move. For this reason, the furnishing and providing for a monetary consideration of a truck, of the maintenance and repair therefor, of insurance with respect to its operation, and of fuel, oil, other materials, equipment and accessories necessary for its efficient operation, without furnishing or providing a driver, cannot be an engaging 'in the business of * * * carriage of * * * property, or both, or of providing or furnishing such transportation service, for hire,' within the meaning of those statutory words. See *Motor Haulage Co. v. United States*, D. C. 70 F. Supp. 17, affirmed without opinion, 331 U. S. 784, 67 S. Ct. 1205, 91 L. Ed. 1815.

See also annotation, 7 A. L. R. 2d 456, 468 et seq. Where, however, a driver is also furnished, then there *may* be an engaging in such business. See 7 A. L. R. *2d supra*, 472. *However, whether there is* will depend in a particular instance upon the relationship between the driver of the truck and the one to whom the truck and driver are furnished; and what that relationship is will necessarily depend upon the facts. If the driver, while driving, is 'in every respect * * * a servant of' the one to whom the truck is leased (as stipulated in the instant case), then his operation of the truck is part of the business of the lessee and not an engaging in business by the driver or someone else. In such an instance, it cannot be said that even a driver-owner of the truck is '*engaged in the business* of private carriage of * * * property * * * or of providing or furnishing such transportation service' within the meaning of the statutory words hereinbefore quoted. See 7 A. L. R. 2d *supra*, 470, 471. If anyone is engaged in such business, it is the master who is in control of the mode and manner of operating the truck. It may be noted that all parties apparently concede that one, who is carrying his own property or providing or furnishing transportation for it, is not engaged in such 'business * * * for hire' within the meaning of the statutory words" (Court's emphasis).

CONCLUSION.

It is respectfully submitted:

1. That a private motor carrier is one recognized by the Congress of the United States and entitled to equal treatment by the Interstate Commerce Commission, the governmental authority authorized and directed to regulate and control the various forms of transportation in the United States;

2. That no preference should be shown between the various forms of motor carrier transportation, to-wit: Common carriers, contract carriers and private carriers;

3. That all forms of motor carriers must supervise and control the operation of all motor vehicles operated by them in the conduct of their motor carrier business;

4. That a private carrier has a right to lease equipment and to employ the lessor, or any other person, to operate the leased vehicle so long as the carrier exercises supervision and control over the equipment and its operator;

5. That the findings and conclusions of the district court should be affirmed.

Respectfully submitted,

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-BRARY

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